Before the
Federal Communications Commission
Washington, D.C. 20544

In the Matter of Petition of Autotel pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Public Utilities Commission of Nevada Regarding Enforcement of Interconnection Agreement with Embarq (formerly Central Telephone of Nevada d/b/a Sprint of Nevada)	)	WC Docket No. 07-240

TO: THE COMMISSION

APPLICATION FOR REVIEW

Autotel, Inc. ("Petitioner"), acting pursuant to 47 C.F.R. § 1.115(a), respectfully seeks review of the action of the Deputy Chief of the Wireline Competition Bureau ("the Bureau") declining to preempt the interconnection jurisdiction of the Public Utilities Commission of Nevada ("PUC"). Memorandum Opinion and Order, WC Docket No. 07-240, DA 07-5114, released January 16, 2008 ("MO&O"). [FN1 This Application is timely filed within the next succeeding 30-day period.] In the MO&O, the Bureau declined to preempt the PUC's jurisdiction relating to the enforcement of Petitioner's Interconnection Agreement ("ICA") with Embarq (formerly Central Telephone of Nevada d/b/a Sprint of Nevada). In denying preemption pursuant to 47 U.S.C. 252(e)(5), the FCC failed to comply with its own statutes and relevant precedents.

ARGUMENT

The Nevada PUC failed to carry out its responsibilities under Section 252. Petitioner filed a Complaint with the PUC seeking enforcement of its Interconnection Agreement with Embarq ("the ICA"). The PUC erred in dismissing the complaint instead of addressing the ICA enforcement issue presented by Autotel. The PUC decided not to exercise its duties under 252(e)(5), and preemption is therefore appropriate. In rejecting Autotel's Petition for Preemption, the FCC not only ignored its statutory mandate but failed to follow relevant precedents, as discussed below.

I. The Relevant Law

The Telecommunications Act of 1996 grants authority to the State Commissions to interpret and enforce Interconnection Agreements between telecommunications carriers. Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 642 n.2, 122 S. Ct. 1753 (2002) (noting that "no

party contends that the Commission lacked jurisdiction to interpret and enforce the agreement," and citing Fourth Circuit analysis supporting such jurisdiction); see also Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114 (9th Cir. 2003) (explaining that Verizon Maryland made clear that jurisdiction exists to enforce as well as arbitrate ICAs); "In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996" ("FCC Declaratory Order"), 14 F.C.C.R. 3703 ¶ 22 (1999), vacated on other grds, Bell Atl. Tel. Co. v. FCC, 206 F.3d 1 (2000). (interconnecting parties "are bound by those agreements, as interpreted and enforced by the state commissions.")

Thus, when an interconnecting carrier seeks to enforce the ICA, a petition to the state Commission is appropriate.

Section 252(b) of the Telecommunications Act provides:

(4) Action by State Commission

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not late than 9 months after the date on which the local exchange carrier received the request under this section.

II. Factual Background

As explained in the Affidavit of Richard L. Oberdorfer which accompanied the Petition to the FCC, Autotel is a small CMRS company authorized to provide wireless service in Nevada. Embarq (formerly Central Telephone Company-Nevada d/b/a Sprint of Nevada) is a telecommunications utility regulated by the Nevada Commission, with offices in Las Vegas, Nevada. Autotel and Embarq entered into an Interconnection Agreement (ICA) which was approved by the Nevada PUC on October 11, 2002, in Docket No. 02-8021. Among other services, the ICA obligates Embarq to interconnect its network with Autotel's network for the mutual exchange of traffic.

Specifically, the ICA provides that Autotel may interconnect at any technically feasible point in Embarq's network, and (at section C.1.3.1): " Interconnection mid-span meet arrangements will be made available to Autotel."

On December 16, 2004, Autotel contacted Embarq's Wireless Interconnection Manager, Teresa Singer, and requested the relocation of the party's existing single DS1 interconnection via one of three technically feasible mid-span meet interconnection arrangements. Embarq refused to provision its portion of any new mid-span meet point interconnection facility requested by Autotel.

Autotel complained to the Nevada PUC and, in an August 24, 2005, Order in Docket No. 05-2022, the Nevada PUC ordered:

The Commission confirms that under mid·span meet point arrangements, Sprint [now Embarq] is responsible for provisioning fifty percent of the interconnection facilities or to Sprint's exchange boundaries, whichever is less. Autotel is responsible for provisioning fifty percent of the interconnection facilities or to Sprint's exchange boundaries, whichever is greater.

The PUC stopped there, requiring Autotel to continue to work with Embarq to actually obtain interconnection, stating that Autotel needed to explore further Embarq's interconnection procedures. Accordingly, on September 6, 2005, Autotel contacted Embarq's National Wireless Access Center and placed a very specific order for a microwave mid-span meet interconnection facility between Embarq's South South central office and Autotel's switch location at 6A Black Mountain Road. A person named Josh in the Embarq Center informed Autotel he could not work the order because the Autotel address was not in Embarq's system. The next day he referred the matter to Ms. Singer. Embarq refused to provision its portion of the new mid-span meet point interconnection facility construction.

On July 28, 2006, Autotel contacted Ms. Singer again and re-ordered the mid-span meet interconnection facility. Embarq refused to provision its portion of the new mid-span meet point interconnection facility construction.

Autotel filed a new complaint with the PUC on September 1, 2006. In that complaint, Autotel requested specifically that the PUC enforce the terms of the ICA relating to midspan meet point interconnection facilities by ordering Embarq to provide the specific requested meetpoint connection and pay its portion of the costs to build out the facilities to the meet point.

On September 5, 2006, the PUC dismissed Autotel's complaint, stating:

Your submission on September 1,2006 is being returned to you due to deficiencies. It does not comply with the Commission's rules and regulations for filings of this nature. The Complaint is being rejected without prejudice.

Any complaint regarding telecommunications companies must comply with requirements listed in chapters 703 and 704 of the Nevada Administrative Code, the Nevada Revised Statutes, and any applicable federal law.

Moreover, the relief requested in the Complaint has already been granted in the order that the Commission issued under Docket No. 05-2022.

Autotel's complaint did comply with all of the referenced requirements; and the prior 2005 PUC decision did not address the specific ICA enforcement issues presented in Autotel's September 1, 2006, complaint. Indeed, the PUC decision could not have addressed the new issues presented, because Embarq's specific refusal to interconnect occurred after the PUC's 2005 decision.

III. Preemption Is Appropriate

In dismissing Autotel's complaint, the PUC did not resolve the unresolved ICA enforcement issues between the parties. The PUC did not schedule any proceedings in order to complete its duties under section 252(b)(4). The PUC requested no information from either party necessary for resolution of the unresolved issues. The PUC did not make a determination as to whether the enforcement issue presented by Autotel met the requirements of the ICA, section 251, and the regulations, and declined to make a decision regarding whether to order Embarq to construct its portion of the specifically requested microwave meet point interconnection facility.

In rejecting Autotel's Petition for Preemption, the FCC not only ignored its statutory mandate but

failed to follow relevant precedents. See In re Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, 12 F.C.C.R., 15594. In that case the FCC explained that a state agency can fail to act under section 252(e)(5) even if it has issued an arbitration order, if that order is a general dismissal that does not resolve all issues "clearly and specifically" presented to it. Id. at 27. See also Global NAPS, Inc. v. Federal Communications Commission, 291 F.3d 832 (D.C. Cir. 2002) ("The FCC's interpretation thus suggests that only if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request, does preemption become a viable option") (emph. added).

In its MO&O, the Bureau appears to have reviewed only one of the PUC's assertions – that Autotel had not complied with unspecified "rules and regulations." First, there is absolutely no support for the PUC's conclusory rejection on these vague grounds. Neither PUC nor Embarq identified any rules or regulations Autotel failed to comply with. If the FCC allows the state commissions to simply cite unspecified "rules" for rejecting complaints, that eviscerates both the requirement that the state commissions actually decide disputes between competing carriers, and the requirement that FCC must step in when the state commissions refuse to do so.

Perhaps more importantly, however, the MO&O failed to address the PUC's second incorrect assertion – that its prior (2005) order had already resolved the issues Autotel was raising. The fact that PUC raised this in its dismissal indicates that rather than a "rules and regulations" issue, PUC simply chose not to address the new controversy. As with the "rules and regulations" tactic, this approach impermissibly allows the PUC to evade its duty to arbitrate disputes between carriers, and the Bureau's ratification of that failing eviscerates the preemption rules.

The PUC accepted Autotel's initial (2005) complaint, identifying no "rules and regulations" problems with the complaint. PUC then dismissed the complaint, confirming that Embarq must indeed provide a midspan meet but requiring Autotel to go back to Embarq with another, presumably more specific, request. After Embarq refused Autotel's second, very specific, interconnection request, the PUC had apparently put into place some new unstated screens, turning away Autotel's complaint. The only remedy available for Autotel now is preemption by the FCC.

If the PUC had made a decision on the issue of whether or not Autotel is entitled to the requested midspan meet interconnection and Embarq's provisioning of its share of that specific connection, the party unhappy with that decision could have gone to District Court to challenge the determination. But since no determination was made, Autotel is in limbo – it cannot go to Court for judicial review (as Embarq knows full well from the arguments it has pressed in the courts against Autotel); and Autotel will be rebuffed by the PUC if it attempts to renew its complaint to the PUC, because PUC insists (incorrectly) that it has already addressed the issues being presented. Autotel is stuck with neither the requested midspan meet interconnection nor a judicially reviewable decision on the issue.

Embarq complained in its Objections to the Bureau, "Here we go again." [FN 2 In the MO&O the Bureau stated that Autotel did not file a reply on its petition, which is correct. That is because Autotel's counsel has no record of Embarq serving her with a copy of Embarq's objections.] Indeed.

Here we go again with Embarq's refusal to comply with the Telecommunications Act, the Interconnection Agreement with Autotel, and the PUC's 2005 order. The fact that a small telecommunications company refuses to accept the "take it or leave it" arrangements proposed by the incumbent carriers, and continues to press its legal arguments in the state commissions and then in the courts and the FCC, should not be viewed as any sort of abuse of the systems that are in place. It is Embarq who has abused the powers it enjoys as the incumbent, by blatantly refusing to provide interconnection pursuant to the ICA. [FN 3 The argument by Embarq (until recently "Sprint") that Autotel files too often with courts and commissions evokes the old saying about people in glass houses. Although Autotel's counsel has not invested her client's funds in researching how many administrative proceedings Sprint/Embarq has filed over the years, its reported federal appellate court cases alone are abundant. See, e.g., Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates, 487 F.3d 694 (9th Cir. 2007) (Sprint challenge to regulation of placement of telephone equipment in public rights of way on aesthetic grounds); Sprint Telephony PCS, L.P. v. County of San Diego, 490 F.3d 700(9th Cir. 2007) (challenge to county's wireless telecommunications ordinance; rejecting Sprint's claim for money damages and fees under 42 U.S.C. 1983); APCC Services, Inc. v. Sprint Communications Co., No. 04-7034 (D.C.Cir. 2007) (rejecting Sprint's appeal of denial of motion to dismiss suit by payphone service provider (PSP) and several "aggregators" for compensation); Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge, 448 F.3d 1067 (9th Cir. 2006) (challenge to city's denial of permits to erect antenna towers); Sprint Communications Co. L.P. v. CAT Communications International, Inc., 335 F.3d 235 (3d Cir. 2003) (dissolving injunction in Sprint's suit against smaller company regarding allegedly unauthorized long distance telephone calls); U.S. West Communications, Inc. v. Sprint Communications Co., L.P., 275 F.3d 1241 (10th Cir. 2002) (Sprint appealed district court's rejection of interconnection agreement); Sprint Communications Company L.P. v. Federal Communications Commission, 274 F.3d 549 (D.C. Cir. 2001) (rejecting all but one of Sprint's attacks on FCC's findings that UNE rates were cost-based); US West Communications, Inc. v. Sprint Communications Co., 211 F.3d 1276 (9th Cir. 2000), cert. denied, 531 U.S. 1001, 121 S. Ct. 504 (2000) (Sprint unsuccessfully appealed summary judgment in favor of US West re: interconnection agreement).]

The statutory nine-month limit for the PUC to resolve the ICA enforcement issues presented by Autotel elapsed prior to Autotel filing the Petition with the Bureau. Those issues were not resolved by the PUC, and PUC refused to make a decision regarding whether to order Embarq to construct its portion of the microwave meet point interconnection facility. PUC's proffered reasons for rejecting the complaint are groundless. The Bureau's rejection of Autotel's preemption petition is not supported by the statutes and other precedent. Preemption is appropriate.

WHEREFORE, THE PREMISES CONSIDERED, the FCC should hear and decide Petitioner's request for enforcement of the Interconnection Agreement.

Respectfully submitted February 14, 2008,

AUTOTEL, INC.

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CERTIFICATE OF FILING AND SERVICE

I, Marianne Dugan, hereby certify that on February 14, 2008, I sent the foregoing document via Federal Express (Standard Overnight) to:

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